INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Argument	6
Conclusion	10

AUTHORITIES

Cases:

Consolo v. *Federal Maritime Commission*, 383 U.S. 607	6
Day-Brite Lighting, Inc. v. *Missouri*, 342 U.S. 421	9
Fibreboard Paper Products Corp. v. *National Labor Relations Board*, 379 U.S. 203	6
Machinists v. *National Labor Relations Board*, 311 U.S. 72	6
Montgomery Ward & Co. v. *National Labor Relations Board*, 339 F. 2d 889	8
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	7
National Labor Relations Board v. *Cities Service Oil Co.*, 122 F. 2d 149	8
National Labor Relations Board v. *H. W. Elson Bottling Co.*, 379 F. 2d 233 enforcing as modified 155 NLRB 714	10
National Labor Relations Board v. *S & H Grossinger's Inc.*, 372 F. 2d 26	8
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344	6
National Labor Relations Board v. *Stowe Spinning Co.*, 336 U.S. 226	8
National Labor Relations Board v. *United Steelworkers*, 357 U.S. 357	7
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177	6
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	8
J. P. Stevens & Co. v. *National Labor Relations Board*, 380 F. 2d 292, certiorari denied, December 11, 1967, No. 684, this Term	6, 9

286-079—68

Miscellaneous:

	Page
Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Board*, 78 Harv. L. Rev. 38 (1964)	7
Note, 14 Chic. L. Rev. 104 (1946)	7
Note, 61 Yale L.J. 1066 (1952)	7
Administration of the National Labor Relations Act, Report of the Subcommittee on National Labor Relations Board, House Committee on Education and Labor, 87th Cong., 1st Sess. (1961)	7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*)	
Section 8(a)(1)	5
Section 8(a)(2)	5
Section 8(a)(3)	5
Section 10(c)	6

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 878

SCOTT'S, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–17) is reported at 383 F. 2d 230. The Board's decision and order (Pet. App. 19–39; J.A. 597–662)[1] are reported at 159 NLRB 1795.

JURISDICTION

The decree of the court of appeals was entered on September 6, 1967. The petition for a writ of certiorari was filed on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to those portions of the record printed as a joint appendix in the court of appeals.

QUESTION PRESENTED

Whether, where an employer has committed a number of serious unfair labor practices, including subjecting its employees to coercive "captive audience" speeches, the National Labor Relations Board acted reasonably in ordering the employer to afford the union access to plant bulletin boards for three months, and to make available suitable facilities so that the union could present its views to the employees for one hour on company time.

STATUTE INVOLVED

The relevant portion of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151 *et seq.*) is set forth at pp. 2–3 of the petition.

STATEMENT

Petitioner company operates three plants in western Michigan which perform a variety of machining and finishing work. In early March 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO began an organizing campaign among petitioner's employees. Petitioner responded by engaging in a six-month anti-union campaign, in which it committed a series of unfair labor practices. Petitioner fired five employees for union activity, one of them a ten-year veteran and another with eight years' seniority. It discriminatorily laid off five other employees—one of them with nine years' seniority. With one exception, all of these employees were members of the union organizing committee (Pet. App. 24–32; J.A. 620–651).

Petitioner's officials—including its president and vice-president in charge of labor relations—repeatedly threatened employees with adverse consequences if they supported the Union. For example, President Scott told a group of employees wearing union buttons, "you guys are going to eat those badges before this is through," and told others that badge wearers would be fired (J.A. 599, 600–601). Superintendent Becksvoort told an employee, "go ahead and vote [for the union]; * * * they can't make us keep this place open and if you don't watch it you will be back in Arkansas picking cotton" (J.A. 614). Scott made a similar threat to various employees (J.A. 600).

Petitioner also indicated to employees that working conditions would worsen if they chose the Union. Scott, for example, told an employee that if the Union were voted in he would cancel all holiday pay, vacation pay, insurance, and seniority (J.A. 599). Labor Relations Vice-President Vandenberg, in one of a series of speeches which he delivered to employees assembled on company time, warned that if the Union came in there would be new work rules and stricter enforcement of existing ones. He added that, when the employees at another Crampton subsidiary[2] chose a union, the work force dropped from 1,200 to 400 and work was transferred from there to Scott's, and that the work might not be retained if the employees chose the Union (Pet. App. 21).

[2] Petitioner Scott's, Inc. is one of the subsidiaries of Crampton Manufacturing Co., which, in turn, is a subsidiary of Gulf and Western, Inc. (Pet. App. 21, n. 2).

In addition to the threats and discharges, petitioner's officials organized an employee "shop committee" to deal with management. Vandenberg urged the employees to utilize such a committee in one of his "captive audience" speeches, telling them a committee was still operating at a Crampton plant although the "Labor Board had made them post notices apologizing for the committee and other things they had done" (Pet. App. 21–22). He added that the Board "slapped our hands just like we were naughty little children [and now we] just don't label it a committee any more" (Pet. App. 22). Petitioner's foremen thereafter selected and solicited employees to represent various departments (J.A. 617–618). Vandenberg told the committee at its first meeting that its purpose was "to try and improve the conditions [in the plant] without the union," by taking up matters like pay rates (J.A. 617–618).

On September 28, despite the pendency of a Board representation proceeding,[3] petitioner announced a pay increase for its employees in letters stating, *inter alia*, that it was unfortunate that the Company had to "deal with the representation argument brought upon us by the outsiders that have been circling our plant for the past seven months or so" (J.A. 472). One of the letters promised that other benefits were being considered and would be forthcoming "as soon as [the] problem with the outsiders is behind us" (Pet. App. 24; J.A. 473).

[3] On March 30, the Union had filed a representation petition seeking an election among petitioner's employees (Pet. App. 23).

On these facts and the other evidence in the record,[4] the Board concluded that the Company had interrogated and threatened employees and promised them benefits in order to deter union organization, in violation of Section 8(a)(1) of the Act. It also found that the Company had interfered with and dominated the employees' committee, in violation of Section 8(a)(1) and (2), and that it had discharged and laid off employes for anti-union reasons, in violation of Section 8(a)(3) and (1) (Pet App. 20–32; J.A. 657–658).

In order to remedy these unfair labor practices, the Board issued an order with the usual cease-and-desist, notice-posting, and reinstatement-with-back-pay provisions (Pet. App. 36–39). In addition, the Board ordered the petitioner to: (1) mail each employee a copy of the notice; (2) convene the employees during working time to read them the contents of the notice; (3) grant the Union and its representatives reasonable access for a three-month period to the plant bulletin boards; and (4) make available to the Union or its representatives, at a mutually agreeable time, facilities for a one-hour meeting at each plant, so that the Union could present its views to the employees assembled on company time (Pet. App. 35–36, 38–39).

Upon review, the court of appeals held that the Board's unfair labor practice findings were supported

[4] Indeed, the incidents here described are merely illustrative of the unfair labor practices which petitioner's top officials and supervisors committed during the course of the Company's anti-union campaign. That conduct is discussed in fuller detail in the decisions of the Board and trial examiner (Pet. App. 19–33; J.A. 596–662).

by substantial evidence (Pet. App. 12–13). It enforced all the provisions of the Board's order except that requiring petitioner to read the contents of the notice to assembled employees (Pet. App. 13–15).[5]

ARGUMENT

1. Section 10(c) of the Act authorizes the Board, where an unfair labor practice has been found, to "take such affirmative action * * * as will effectuate the policies of the Act." This Court has repeatedly emphasized the Board's broad discretion in the formulation of remedial orders and the restraint that the courts of appeals are to exercise in reviewing Board orders. See *Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 82; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194–195; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346–347; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216. Cf. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621. Contrary to petitioner's contention (Pet. 7), the limited access to its premises which the Board directed the Company to afford the Union is a reasonable means of remedying the unfair labor practices here committed. Thus, petitioner had engaged, the Board found, in extensive

[5] Circuit Judge Wright (Pet. App. 16–17) would have enforced that provision of the order too, or, alternatively, would have remanded it to the Board for reconsideration in light of the modification made in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F. 2d 292, 304–305 (C.A. 2), certiorari denied, December 11, 1967, No. 684, this Term. The Board is not seeking certiorari on this issue.

unfair labor practices, including the delivery of coercive speeches to the employees on company time and premises,[6] and those unfair labor practices created an "imbalance" in the Union's opportunities for conveying its organizational message to the employees (Pet. App. 36). To give the Union access to plant bulletin boards for a three-month period, and a one-hour opportunity to reply on company time and premises to petitioner's "captive audience" speeches, no more than redresses the balance, by affording the Union the same access to the employees for the dissemination of its views as petitioner enjoyed when it engaged in its unlawful efforts to defeat the Union.

Nor was the Board's order invalid because the Board failed to make findings regarding the availability to the Union of alternative means of reaching the employees. Compare *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357. Those two cases, upon which petitioner relies (Pet. 7), considered the circumstances under which the Board could find a prohibition on distribu-

[6] The effectiveness of that anti-union weapon has repeatedly been recognized. See Note, 61 Yale L.J. 1066, 1074–1076, nn. 33–39 (1952); Note, 14 U. Chi. L. Rev. 104, 108–109 (1946); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Board*, 78 Harv. L. Rev. 38, 100–103 (1964). Cf. *Administration of the National Labor Relations Act*, Report of the Subcommittee on National Labor Relations Board, House Committee on Education and Labor, 87th Cong., 1st Sess., pp. 55–59 (1961).

tion of union literature and solicitation of union membership on an employer's premises to be an unfair labor practice; in that context, this Court stated the Board must make findings concerning alternative means of access available to the union, where non-employee organizers are involved. Here, however, the question is not the lawfulness of excluding union representatives from the premises, *ab initio,* but the scope of the Board's remedial authority with respect to unfair labor practices which have been established. Nothing in the cases relied on purports to deal with that problem. In any event, the Board expressly found that petitioner's unfair labor practices created an imbalance in the Union's organizational opportunities, requiring special access to obtain adequate redress (Pet. App. 36).

Finally, there is no substance to petitioner's contention (Pet. 7–8) that the Board's order is an unconstitutional invasion of property rights. This Court has held that the Fifth Amendment does not prohibit Board orders requiring, in appropriate circumstances, that an employer make its premises available for union organizational activity. *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U.S. 226, 232; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 802, n. 8.[7] As the Court said in *Republic Aviation,* "Inconvenience, or even some disloca-

[7] See also *Montgomery Ward & Co.* v. *National Labor Relations Board,* 339 F. 2d 889, 894–895 (C.A. 6); *National Labor Relations Board* v. *S & H Grossinger's Inc.,* 372 F. 2d 26 (C.A. 2); *National Labor Relations Board* v. *Cities Service Oil Co.,* 122 F. 2d 149 (C.A. 2).

tion of property rights, may be necessary in order to safeguard the right to collective bargaining" (324 U.S. at 802, n. 8, quoted in *Stowe Spinning*, 336 U.S. at 232). Moreover, the holding in *Republic Aviation* that an employer must permit employees to engage in union activity on break time (for which they are ordinarily paid) shows that, where necessary to effectuate the rights guaranteed by the Act, the Board may even require that organizational activity be permitted on company time (cf. Pet. 8)[8]. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424–425.

2. Review is not warranted in this case simply because the Second Circuit in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F. 2d 292, 305 (C.A. 2), certiorari denied, December 11, 1967, No. 684, this Term, declined to enforce a provision of a Board order giving the union access to the company bulletin boards (see Pet. 8–9). The Second Circuit's action in *Stevens* rests upon the premise—erroneous in the Board's view—that, since no unique problem of access had been shown, such a requirement could not be justified. While this consideration may be relevant in determining whether an unfair labor practice has been committed, it is irrelevant, in the Board's view, in ascertaining what constitutes an appropriate remedy for eradicating the effects of unfair labor practices which have already been established. In any event, there is no necessity for granting review in the instant case on this

[8] Since Vice-President Vandenberg addressed the employees on company time (*supra*, pp. 3–4), the Board did not act unreasonably in concluding that the Union required comparable conditions to negate the effects of Vandenberg's actions.

rather narrow question which, in the Board's view, was correctly decided by the court below.[9]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GEORGE B. DRIESEN,
Attorney,
National Labor Relations Board.

JANUARY 1968.

---

[9] *National Labor Relations Board* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223 (C.A. 6), enforcing as modified, *H. W. Elson Bottling Co.*, 155 NLRB 714, does not require a different conclusion. There the court, although noting that it would enforce a Board order requiring the employer to permit a union to make a one-hour speech on company premises under "more aggravated circumstances" (379 F. 2d at 226), modified the order in that case so as to permit such access only if the employer again made "captive audience" speeches to its employees. In *Elson*, only 23 employees were in the bargaining unit, and no employees were discharged or laid off for joining the union. Here, on the other hand, about 350 employees were involved (J.A. 461–462), and the unfair labor practices were indeed "aggravated" (Pet. App. 14, n. 4). In short, *Elson* is distinguishable on its facts.

U.S. GOVERNMENT PRINTING OFFICE: 1968